

REPORT BY THE U.S.

General Accounting Office

ORIGINAL

The Office Of The Special Counsel Can Improve Its Management Of Whistleblower Cases

COMPLETED

The Office of the Special Counsel within the Merit Systems Protection Board was established to provide Federal employees a safe channel for reporting Government illegalities, mismanagement, waste, abuse of authority, or danger to public health or safety. The Congress considered this reporting process, known as "whistleblowing," to be a major step toward a more effective civil service.

GAO has found, however, that this reporting process can be better managed. Serious startup problems, delays in case processing, poor communication with whistleblowers, and inadequate followup of agencies' responses to complaints jeopardize the Special Counsel's relationship with whistleblowers.

This report recommends several management improvements which the Special Counsel can make immediately. Once made, these improvements will allow the Special Counsel to better manage its responsibilities regarding the whistleblowing provision and will help establish the Counsel's credibility as a safe channel for blowing the whistle on Government wrongdoings.



19

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FEDERAL PERSONNEL AND
COMPENSATION DIVISION

B-198497

Ms. Mary Eastwood
Acting Special Counsel
Office of the Special Counsel

Dear Ms. Eastwood:

As part of our congressionally mandated activities, we have reviewed the Office of the Special Counsel, within the Merit Systems Protection Board, to determine how the Office is implementing its responsibilities to whistleblowers-- those present or former Federal employees, or applicants for Federal employment, who report Government illegalities, mismanagement, waste, abuse of authority, or danger to public health or safety.

We recognize that in addition to your serious startup problems, more recent problems, such as (1) the lack of a permanent Special Counsel, (2) budget reductions, and (3) the unclear operating relationship between the Office of the Special Counsel and the Merit Systems Protection Board, have hampered your office's operations.

In spite of these obstacles, however, it is our opinion that the Special Counsel's office can make several improvements to better manage its whistleblower responsibilities. We believe the Special Counsel's office can improve its operations by

- establishing a system to insure timely processing of whistleblower complaints;
- improving communications with whistleblowers; and
- instituting followup procedures to insure that agency reports responding to whistleblower allegations are accurate and that agencies take prompt, corrective action.

Because Federal employees are still uncertain about the role, responsibilities, and procedures of the Office of the Special Counsel with regard to whistleblowing, the Special

Counsel needs to provide clear guidance to Federal employees on how to report Government waste, mismanagement, and general wrongdoings.

We conducted our review at the Special Counsel's headquarters in Washington, D.C. We interviewed Special Counsel officials and analyzed 72 whistleblowing types of allegations which the Special Counsel closed during the first 3 months of 1980. We also obtained views and comments from agency, union, special interest group representatives and selected whistleblowers, regarding their experiences and impressions of the operations of the Special Counsel.

Following is a brief discussion of areas where the Special Counsel's operations can be improved. A more detailed analysis, followed by your agency's comments, is included in the appendix. (See app. I and II.)

CASE PROCESSING DELAYS
NEED TO BE RESOLVED

Our examination of 72 whistleblowing type allegations indicates that complaint processing is generally not effectively managed. At present there is no system to insure that cases are processed in a timely manner. As a result, delays are common in every phase of case processing.

The Civil Service Reform Act requires the Special Counsel to promptly transmit to the agency involved the information on an alleged wrongdoing and to determine, within 15 days after receipt of a complaint, whether the information shows a substantial likelihood that a violation has occurred. Of the 72 allegations we reviewed, not one was required to have an indepth investigation; only 12 were forwarded to agencies. For these 12 cases, the Special Counsel's office took an average of 95 days to request an agency report after receiving the complaint. Overall, processing a case from start to finish took the Special Counsel an average of 195 days.

Once the agency report is received, the Special Counsel is required to inform the complainant of the agency's response to the allegations. The transmittal of these reports has also been slow. For the 72 cases reviewed, your office took an average of better than 71 days just to notify the whistleblower that the Special Counsel had received the agency's report.

Our review shows that one of the causes for delays in processing is the lack of an effective case-tracking and case-monitoring system. The index card file system has not

provided a means for effectively monitoring, managing, and tracking not only whistleblower cases, but also the other types of complaints received by the Special Counsel. While we are aware that the office is working on an automated case-tracking system, it has not yet been put into full operation. Currently, the Special Counsel's office is transferring data maintained on the index cards to the automated system. Unless the automated system, when put into full operation, is used to insure that cases are processed within established time limits, it will not correct the case processing problems we identified.

In all likelihood, the Special Counsel's office will receive more whistleblower complaints as its responsibilities become better known among Federal employees. Then the need for an effective case-tracking/monitoring system, with established processing time targets, will become even more critical. Such a system would also help management in making decisions affecting the operations--staffing, budgeting, and resource allocations--of the entire office.

We recommend that the Special Counsel's office control its caseload by placing a high priority on improving its case-tracking/monitoring system.

NEED FOR BETTER COMMUNICATION
WITH WHISTLEBLOWERS

Communication between the Special Counsel and whistleblowers can be improved. Our analysis of the 72 allegations indicates that it often takes the Special Counsel months to inform individuals of the action which will be taken regarding their complaints. Specifically, the Special Counsel took an average of 87 days to tell individuals in 33 of the 72 cases that their complaints did not fall within the Special Counsel's jurisdiction. For the 12 cases on which the Special Counsel's office requested an agency report, it took an average of 98 days before complainants were notified that their complaints had been referred to the concerned agency for a report.

In addition, there is a need to insure that a whistleblower's allegation is clearly understood and communicated to the agency involved. Five of the six agency officials we interviewed stated that it is often difficult and time consuming to identify the specific issues in whistleblower allegations because these allegations are not clearly presented to the involved agencies.

We recommend that the Special Counsel improve its communication with whistleblowers to assure that their allegations are clearly understood and that they are kept informed of the progress of their cases.

FOLLOWUP ON AGENCY REPORTS NEEDED

When the Special Counsel's office receives an agency report, the office does not determine the accuracy of the report. Nor does the office determine if corrective action has or has not been taken.

The Special Counsel's office did not question any of the 12 reports received and considered all 12 cases closed after receiving the agency reports. However, at the time of our review, we found that final action had not yet been taken in at least five of the cases. Also, none of the agencies indicated when they would complete corrective action, even though the Reform Act requires them to do so.

In eight cases, agencies reported to the Special Counsel that they had either taken corrective action or would further study the alleged problem. The Special Counsel's office, however, did not monitor either the implementation, timeliness, or effectiveness of the action taken or proposed.

We believe that the Special Counsel's office is taking a narrow interpretation of its responsibilities in reviewing agency reports. The Special Counsel's office believes that when it does not require an agency to investigate an allegation in depth, the Reform Act authorizes the Special Counsel to inform the whistleblower of the agency's report, but does not authorize the Special Counsel to take further action concerning the report, or to make any comments on the report's accuracy. While the Reform Act does not require the Special Counsel to review agency reports, the act does not specifically prohibit such reviews.

It is our view that whistleblowers can be a valuable source of information in following up on agency reports. Our review of the Special Counsel's correspondence which forwarded agency responses to whistleblowers indicates that such feedback or assistance is not encouraged.

We recommend that the Special Counsel follow up on agency reports responding to whistleblower allegations and actively encourage complainants' evaluations and comments to these reports.

ADDITIONAL INFORMATION ON SPECIAL
COUNSEL PROCEDURES NEEDED

We believe that the Special Counsel can do more to encourage Federal employees to report improper or illegal Government activities. Federal employees appear confused about the role and responsibility of the Special Counsel. This confusion was substantiated not only in interviews we held with the Acting Special Counsel and some agency officials, but also by the large number of cases received by, but not within the jurisdiction of, the Special Counsel's office.

While the present Acting Special Counsel has taken a number of steps to dispel this confusion, we believe additional emphasis is still needed. At present, an informational pamphlet prepared by the office does not provide in clear layman's language examples of reportable wrongdoings or prohibited personnel practices that fall within the Special Counsel's jurisdiction. We recommend that the Special Counsel place greater emphasis on encouraging Federal employees to disclose wrongful activities by more clearly informing agencies and employees of its role in receiving whistleblower complaints.

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We received formal comments on this report from the Acting Special Counsel who did not completely agree with our conclusions. However, it is our view that the Acting Special Counsel's comments did not fully address the major issues in our report. For example, the Acting Special Counsel did not fully address the delays in case processing, the need for followup procedures to assure that agency reports are accurate, and the need for improving communication with whistleblowers. In discussions with the Acting Special Counsel during our work, however, these problems were recognized, and we were told that corrective action would be taken. The Acting Special Counsel also did not agree with our position regarding the Special Counsel's pamphlet. Our detailed response to the Acting Special Counsel's comments are discussed in the appendix.

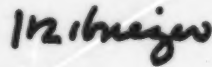
As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than

B-198497

60 days after the date of the report. This written statement must also be sent to the House and Senate Committees on Appropriations, with the agency's first request for appropriations made more than 60 days after the date of the report.

We are sending copies of this report to the Senate Committee on Governmental Affairs; the House Committee on Post Office and Civil Service; the Director, Office of Management and Budget; the Deputy Director, Office of Personnel Management; and the Chair, Merit Systems Protection Board.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "H. L. Krieger".

H. L. Krieger
Director

THE OFFICE OF THE SPECIAL COUNSEL CAN IMPROVEITS MANAGEMENT OF WHISTLEBLOWER CASES:A MORE DETAILED DISCUSSIONBACKGROUND

The Office of the Special Counsel was established on January 1, 1979, by the Reorganization Plan No. 2 of 1978, and its functions and responsibilities were subsequently expanded under the Civil Service Reform Act which became effective on January 11, 1979.

Two of the significant responsibilities of the Special Counsel are to

- establish procedures to insure that allegations of wrongdoings are properly investigated in the executive branch and
- protect from reprisals those employees who disclose information about agency wrongdoings.

When the Office of the Special Counsel receives information which evidences a violation of law, rule, or regulation; mismanagement, gross waste of funds, abuse of authority; or a substantial and specific danger to public health or safety, it is required to review the allegation and promptly transmit it to the appropriate agency head.

If the Office of the Special Counsel determines that the allegation evidences a substantial likelihood that a violation has occurred, the Special Counsel may require that an agency investigation be made and a written report be submitted by the appropriate agency head within 60 days to the President, the Congress, and to the Special Counsel, for subsequent transmittal to the complainant. Whenever the Special Counsel does not require an agency investigation, the head of the agency is required, within a reasonable time, but no later than 60 days after the information was forwarded by the Special Counsel, to inform the Special Counsel in writing of what action has been or is to be taken and when such action will be completed. In all cases, the whistleblower must be notified when the report is received from the agency.

In addition to requesting agency investigations of whistleblower allegations, the Special Counsel also has the responsibility to directly investigate prohibited personnel

practices, including a reprisal against a whistleblower. If the Special Counsel determines that there are reasonable grounds to believe that any act of reprisal has occurred, exists, or is to be taken, the Special Counsel can request the Merit Systems Protection Board to stay such a practice and can bring disciplinary actions against the responsible official engaging in the reprisal action.

PROBLEMS NOT WITHIN THE SPECIAL COUNSEL'S CONTROL

The Office of the Special Counsel has encountered certain problems not within its power to correct. These problems have adversely affected the office's ability to carry out its responsibilities to whistleblowers.

Lack of permanent management leadership

Since the resignation of the first Special Counsel in December 1979, this office has been operating under an Acting Special Counsel. The Office of the Special Counsel will not have a permanent Special Counsel until some time in 1981. Although the Acting Special Counsel has made progress in establishing the office's capability to carry out its functions, without a permanent Special Counsel, this office cannot provide the active leadership necessary to vigorously implement the whistleblowing program.

In fact, the eventual success of the whistleblowing legislation may be directly attributed to how the Special Counsel's office is perceived and accepted by Federal employees. Therefore, it is necessary for Federal employees to have confidence in reporting mismanagement and illegal activities to a Special Counsel that can be removed only by the President for inefficiency, neglect of duty, or malfeasance in office. Without this assurance of independence, Federal employees may not have the necessary confidence to report mismanagement and illegal activities.

Reductions in budget seriously affected the Special Counsel's operations

Many of the Special Counsel's operations, including protection for whistleblowers, were affected by a recent budget reduction. On July 8, 1980, the President signed Public Law 96-304 which reduced the Special Counsel's office budget from \$4.5 million to \$2.5 million for fiscal year 1980. This reduction adversely affected all areas of operations, including near total curtailment of the office's statutorily

mandated activities. From July 21 through September 30, 1980, the Special Counsel's office terminated, as a result of this reduction, all hirings, travel for investigations of complaints, and purchase plans. In addition, about 60 percent of the office's staff was detailed to the Merit Systems Protection Board. As a result, the Special Counsel's office anticipates additional case backlog with even longer delays in case processing. Furthermore, all investigations into reprisal allegations which would require travel by the staff were terminated.

We believe this budget cut seriously compounds the problems we identify in this report and further reduces the ability of the Office of the Special Counsel to meet its congressional mandate. It also raises questions about the real commitment of the Congress and the Administration to the activities and responsibilities of the Special Counsel.

Although final action for the fiscal year 1981 budget has not been approved, the Special Counsel is expected to receive a budget of \$4.25 million. We believe, with this budget, the recommendations in this report can be accomplished and should result in improved implementation of the whistleblower responsibilities of the Civil Service Reform Act.

Relationship between the Merit Systems Protection Board and the Special Counsel

The Board and the Special Counsel's office were given separate authorities and functions under the President's Reorganization Plan and the Civil Service Reform Act. Although the Special Counsel is an independent office, both the Board and the Special Counsel share the common objective and responsibility for insuring that personnel practices in the Federal Government are consistent with merit systems principles.

Since the establishment of the Board, a number of questions have been raised concerning the relationship between the Board and the Special Counsel and their authority with respect to one another. The intended legal relationship is not clearly defined in the President's Reorganization Plan, or in the Reform Act. While the Special Counsel has regulatory and management control over its operations, it does not have independent budget authority. In this respect, the Special Counsel's operations are influenced by administrative decisions of the Board--concerning office space, contracts, and procurement.

This influence was highlighted after the Special Counsel's \$2 million budget reduction. The Board's Chairwoman notified the Special Counsel on August 21, 1980, of the Board's intentions to suspend all delegations of authority previously provided to the Special Counsel, including administrative responsibility for all hiring and other personnel actions. The Special Counsel's office, however, has not followed the Chairwoman's directive. On November 21, 1980, the Board filed suit against the Acting Special Counsel asking the United States District Court for the District of Columbia to rule on the independence of the Special Counsel's office. It is not known when the court will rule on this case.

CASE PROCESSING DELAYS
NEED TO BE RESOLVED

Under the Civil Service Reform Act, certain time frames were established to insure timely processing and resolution of whistleblowing allegations received by the Special Counsel. In a previous report 1/ we concluded that most of the whistleblowing cases closed during the Special Counsel's first 10 months of operation (Jan. through Oct. 31, 1979) were not processed within the established time frames. We also reported that agency responses to the Special Counsel's inquiries were not timely. Our analysis of whistleblowing allegation cases closed from January 1 to March 31, 1980, indicates continued delays in case processing.

Of the 72 allegations the Special Counsel's office closed in the 3-month period

- 33 were not considered to be within its jurisdiction;
- 15 were not forwarded to agencies because of a lack of evidence;
- 12 were not forwarded to agencies for other reasons--either the allegations were treated as suggestions rather than as whistleblowing complaints, or another agency was conducting an inquiry, or the allegation occurred prior to the effective date of the act; and

1/"First-year Activities of the Merit Systems Protection Board and the Office of the Special Counsel" (FPCD-80-46, June 9, 1980).

--12 were forwarded to agencies with the Special Counsel's request for a report on what action has been or is to be taken and when such action will be completed.

For the 12 cases forwarded to agencies with request for an agency report, it took an average of 195 days to process them from the receipt of the complaints to their closing. The following chart gives the time frames for processing these cases:

<u>Stages</u>	<u>Time frames (days)</u>	
	<u>Average</u>	<u>Range</u>
Time to request an agency report after receiving complaint.	95	35 to 148
Time to receive an agency report after requesting it.	67	33 to 113
Time to notify complainant of agency report after receiving it.	71	8 to 223

As shown above, it required from 35 to 148 days, or an average of 95 days, for the Special Counsel to request an agency report after receiving the complaints. In six of these cases, the agency responses exceeded, by an average of 26 days, the 60-day time frames established by the Special Counsel. In one case the agency took 113 days to prepare the report for the Special Counsel.

Once the agency report is received, the Special Counsel is required to inform the complainant of the agency's response to the allegations. The transmittal of these reports, however, has been slow. For the closed cases examined, it took the Special Counsel from 8 days to almost 8 months, or an average of 71 days, to notify the whistleblower of the reports' receipt.

We pointed out in a previous report that the Special Counsel's case processing has not been timely. The Acting Special Counsel recognized this problem at the March 1980 oversight hearings before the House Subcommittee on Civil Service. At these hearings the Acting Special Counsel stated:

"It is difficult and stressful for an employee to be at odds with his or her agency for a long period of time. Virtually anything that can be done to shorten the time between the employee filing a complaint with our office and its final conclusion, regardless of the outcome, is in the employee's interest."

One cause for processing delays has been the lack of an effective case-tracking/monitoring system. The present system is a manual system consisting of index cards which include the name of the complainant, agency involved, location, and a brief description of the complaint and action taken. This system provides no means for effectively monitoring, managing, and tracking not only whistleblower cases, but also other types of complaints the Special Counsel receives. In fact, the Special Counsel's office had difficulty accurately identifying the whistleblowing cases it had received and/or had closed during the time period we reviewed. This office was only able to provide us with their best estimate of the number of such cases.

In our previous reports, we recommended that the Special Counsel place a high priority on establishing a case-tracking/monitoring system. The Special Counsel's office has begun an effort to convert their manual card system into an automated complaint-tracking and case-monitoring system. While we believe such a system will allow for more effective case tracking, this system must also emphasize timely case processing. As the Special Counsel's responsibilities become better known among Federal employees and more complaints are received by the Special Counsel, the need for an effective case management system will become even more critical.

NEED FOR BETTER COMMUNICATION WITH WHISTLEBLOWERS

We believe that communication between the Special Counsel's office and whistleblowers can be improved. Our analysis of the 72 allegations indicates that it often takes the Special Counsel months to inform individuals on the action taken on their complaints.

During our review of the 72 allegations, we found numerous instances where the Special Counsel could improve the timeliness and degree of communication with whistleblowers. For example, it took the Special Counsel from 6 to 333 days, or an average time of 87 days, to tell individuals in 33 cases that their complaints did not fall within the Special Counsel's jurisdiction. For the 12 cases on which the Special Counsel requested an agency report, it took from 17 days to 245 days, or an average of 98 days, before the complainant was notified of this action.

In the oversight hearings on March 4, 1980, the Government Accountability Project, Institute for Policy Studies, testified that the lack of communication between whistleblowers and the Special Counsel has created problems of distrust and disillusionment. A Project official said employees frequently came to the Project for help because they did not believe the Special Counsel was acting on their allegations. However, when Project officials talked to the Special Counsel about what actions were being taken, they learned that the cases were being processed. We believe this lack of communication could compromise the Special Counsel's credibility.

In addition to the need to improve communication by keeping complainants informed on the progress of their cases, the Special Counsel's office could improve its credibility by

- working with complainants in identifying and developing the primary issues in the complaints to assure that there are no misunderstandings, and
- encouraging assistance from whistleblowers in evaluating agency reports responding to their allegations.

The Special Counsel's office receives allegations from several sources including individual employees, groups of employees, or employees' representatives. According to the Acting Special Counsel, when employees or their representatives are aware of the Special Counsel's procedures and requirements for processing the complaints, the issues in the complaints are often well defined with documentation supporting the charges. Complaints are often vague and rambling, however, when received from employees who are not familiar with the Special Counsel's requirements. The communication problem is compounded when the Special Counsel forwards the complaints to the agencies without identifying or clearly defining the specific concerns.

We believe that if the Special Counsel's office improves communications with whistleblowers, starting with discussing in greater detail the basis of the allegations, the office could facilitate a clearer understanding of the issues being made. More frequent communication would not only help the Special Counsel to clarify the whistleblower's allegation, but would also help agencies to respond to the alleged wrongdoings.

Unless whistleblowers are represented by a union or an attorney, they may not have the expertise or knowledge to present their allegations to the Special Counsel in the format that would substantiate the charges. It is our opinion that the Special Counsel's office should assure itself that it clearly understands the whistleblowers' allegations of wrongdoings before closing a case. Moreover, when the Special Counsel determines that there is evidence of a violation, the office should make certain that the allegations are clearly defined before requesting an agency to respond to them. This would not only improve the credibility of the Special Counsel by assuring complainants that their allegations are being taken seriously, but would also give specific guidance to the agencies by identifying the issues they should address in their reports.

FOLLOWUP ON AGENCY REPORTS NEEDED

When the Special Counsel receives an agency report, it does not determine if the reports are accurate, if the corrective measures reported by agencies are implemented in a timely manner, or even if the corrective measures are implemented at all.

As previously noted, the Special Counsel requested reports from agencies for 12 allegations. The following chart summarizes the agencies' reported actions as a result of the whistleblowing allegations.

<u>Number of cases</u>	<u>Actions reported by agencies</u>
4	Agency could not identify a problem or substantiate the allegation.
2	Agency reprimanded or took other disciplinary actions against officials guilty of wrongdoing.
3	Agency is monitoring or investigating the situation.
1	GAO is reviewing the alleged problem, and agency said they would implement GAO's recommendations.
1	Agency indicated corrective action would be taken.
1	Corrective action was taken and was to the complainant's satisfaction.

The Special Counsel did not question any of the 12 reports received from agencies and considered all closed. In at least five of the cases, however, no final action had yet been taken during the period of our review. Also, in none of the reports from the agencies to the Special Counsel was there any indication as to when corrective action would be taken, although the Reform Act requires these reports to indicate when the corrective action will be completed. The assistant Special Counsel told us that the office recognizes this problem and plans to start enforcing the statutory requirements on agency reports relating to whistleblowing allegations.

Agencies reported to the Special Counsel that in eight cases they had either taken corrective action or would further study the alleged problem. However, the Special Counsel did not monitor either the implementation, timeliness, or effectiveness of the action taken or proposed by the agencies. In one case the agency had reported to the Special Counsel that its Inspector General was investigating a certain aspect of the allegation. This report was sent to the whistleblower. A representative from the Inspector General's office told us, however, that such an investigation of that particular aspect was not conducted or planned. Because the Special Counsel does not follow up on agency reports, this discrepancy was not resolved nor communicated to the whistleblower at the time of our review.

Whistleblowers could be a valuable source of information in evaluating agency reports responding to the alleged wrongdoings. Our review of the Special Counsel's correspondence forwarding agency responses to whistleblowers indicates that such feedback or assistance is not encouraged. We believe that whistleblower evaluations of agency reports could not only help assure the Special Counsel that the allegations are being seriously reviewed by proper agency officials, but could also assist in checking agency reports for accuracy and completeness.

We believe the Special Counsel's office should establish followup procedures to assure that agency reports responding to whistleblower allegations are accurate and that measures reported by agencies to correct the wrongdoings are taken in a timely manner. Followup procedures need not be elaborate and could consist of followup phone calls or random inquiry of certain reports with involved agencies. What is important is that credibility and accountability be established for agency reports.

ADDITIONAL INFORMATION ON SPECIAL
COUNSEL PROCEDURES NEEDED

The Special Counsel can do more to encourage Federal employees to report improper or illegal Government activities. Federal employees generally appear confused about the role and responsibility of the Special Counsel. This confusion was substantiated not only in interviews we held with the Acting Special Counsel and some agency officials, but also by the large number of cases received by the Special Counsel's office which were determined not within its jurisdiction. The Acting Special Counsel told us that once employees become aware of the role and responsibility of the Special Counsel's office, the number of nonjurisdictional cases received should decrease.

In hearings before the House Subcommittee on Civil Service of the Committee on Post Office and Civil Service on March 4, 1980, the Acting Special Counsel said there was substantial confusion among Federal employees about the role and duties of the Office of the Special Counsel. This lack of understanding of the Special Counsel's role and responsibility surfaced in our work. Most agency officials with whom we spoke told us that employees at their agencies probably were not aware of the Special Counsel's role in whistleblowing protection. One agency official who was responsible for investigating whistleblowing complaints admitted that he himself did not know what the Special Counsel's responsibilities were under the Civil Service Reform Act.

Most of the whistleblowers we talked with told us they learned about the Special Counsel's office either through newspaper articles or through their unions. One whistleblower told us he inquired at his agency's employee relations office about the information needed to submit a complaint to the Special Counsel, but this office was not familiar with the Special Counsel's requirements or procedures for submitting complaints.

In a report dated October 22, 1979, ^{1/} we recommended that the Special Counsel take immediate action to inform Federal employees in nonlegalistic terms of the function and role of the Special Counsel's office. While the present Acting Special Counsel has made progress in this area, we believe additional emphasis is needed. An informational

^{1/}"Merit Systems and Employee Protection," (FPCD-80-15, Oct. 22, 1979).

pamphlet and poster recently developed by the Special Counsel's office is a sign of this progress, but also points out the need for additional clarity. The informational pamphlet describes the role and functions of the Special Counsel and the steps an employee should take in filing a complaint with the Special Counsel's office. While the Special Counsel explains its whistleblowing role and responsibilities and required filing procedures in the pamphlet, the language may still be too "legalistic" and confusing for many Federal employees to understand.

A similar view was expressed by an agency official who also had previewed the draft pamphlet. This official stated that he thought the proposed pamphlet was merely a repetition of the wording in the Reform Act, and that employees would not understand the Special Counsel's role in receiving whistleblower allegations and protecting them against reprisals.

The Special Counsel's informational pamphlet does not provide in clear layman's language examples of reportable wrongdoings or prohibited personnel practices that fall within the Special Counsel's jurisdiction. Also, the pamphlet does not provide enough information about the actual step-by-step procedures the Special Counsel follows or the reasons why certain procedures are followed. We believe that if the Special Counsel's office further clarifies the information already in the pamphlet and provides the additional procedural information, the pamphlet would better help people understand the Special Counsel's role and possibly preclude any false expectations or misperceptions by those seeking the Special Counsel's help.

The Special Counsel's office also plans to distribute informational posters pertaining to its areas of responsibility. In describing its whistleblowing responsibilities, however, the poster only states the legal definition of whistleblowing and does not encourage the reporting of wrongful acts.

CONCLUSION

Under the Reform Act, the Office of the Special Counsel has a significant responsibility to whistleblowers. If the Office of the Special Counsel is to be the focal point in the Federal Government for protecting whistleblowers and disclosing Government mismanagement, waste, and corruption, it must establish its identity and credibility with Federal

agencies and employees. Accordingly, it is important that the Special Counsel process whistleblowing complaints on a timely basis, and that it establish necessary communication with whistleblowers to provide them assurance that their allegations of wrongdoings are clearly understood and are being seriously reviewed. The Special Counsel needs to assure that agency reports responding to the allegations are accurate and that measures reported by agencies to correct the wrongdoings are promptly taken. To preclude any false expectations or misperceptions, it is important that agencies and employees have a clear understanding of the Special Counsel's role in receiving whistleblowing complaints. Although the lack of staff and reduction in budget have affected the Special Counsel's operations, we believe it still can improve its management of whistleblowing cases to better meet its congressionally mandated role and responsibility.

RECOMMENDATIONS TO THE OFFICE
OF THE SPECIAL COUNSEL

We recommend that the Special Counsel's office:

- Control its caseload by placing a high priority on improving its case-tracking/monitoring system, to insure timely processing of whistleblower complaints.
- Improve communication with whistleblowers to assure that their allegations are clearly understood and that they are kept informed of the progress of their cases.
- Follow up on agency reports responding to whistleblower allegations and actively encourage complainants' evaluations and comments on these reports.
- Place greater emphasis on encouraging Federal employees to disclose wrongful activities by more clearly informing agencies and employees of its role in receiving whistleblower complaints.

OUR RESPONSE TO SPECIAL COUNSEL'S COMMENTS

The Office of the Special Counsel did not fully agree with our conclusions concerning its need to improve communications with whistleblowers and to reduce the delays in case processing. The Acting Special Counsel said the report incorrectly implies that delays in case processing are always contrary to the interest of the employee. There are some instances when the Special Counsel may keep a case open in

order to receive additional information from the complainant, or if an agency action which would give the Special Counsel the jurisdiction to assist the employee is anticipated.

We agree with the Acting Special Counsel that there are some instances where delays in case processing may be justified. We do not believe, however, that delays are justified at every phase of case processing. For example, it should not take the Special Counsel an average of 98 days to inform whistleblowers that their complaints have been received; nor should it take 87 days to inform 33 employees that their whistleblowing allegations were not within the jurisdiction of the Special Counsel. It is our opinion that these and other delays mentioned in the report adversely affect a whistleblower's confidence in the operations of the Special Counsel.

We also recognize, as we noted in the report, that inadequate resources may have contributed to the delays in case processing. The cases we reviewed, however, were the most recent cases closed and represented the Special Counsel's performance after 1 full year of operation.

The Acting Special Counsel believes that the report is misleading because it implies that encouraging whistleblowing is the sole and exclusive responsibility of the Special Counsel. In addition, the Acting Special Counsel disagreed with our conclusion that its outreach informational pamphlet was too legalistic or technical. The Acting Special Counsel said a more simplistic pamphlet might serve to mislead employees regarding the function of this office.

Although the Acting Special Counsel disagrees with our conclusions concerning its outreach informational pamphlet, we believe the pamphlet does not provide sufficient information concerning the procedures the Special Counsel follows after receiving a complaint; nor does the pamphlet give examples of the types of cases under the Special Counsel's jurisdiction. It is our opinion that the pamphlet implies that the Special Counsel will investigate all complaints of prohibited personnel practices, when, in fact, the Special Counsel can make a preliminary inquiry into the allegation before deciding to do a full scale investigation. Some employees, after reading the pamphlet, may think the Special Counsel investigates all allegations of prohibited personnel practices. The distinction between an inquiry and investigation is not clearly presented in the pamphlet.

We believe that encouraging Federal employees to report Government wrongdoings is the responsibility of all Government instrumentalities. Nevertheless, the Special Counsel is the focal point for insuring the integrity of Federal merit systems and protecting the rights of employees within those systems. The Reform Act intended this office to have the broad authority to protect individuals who expose wrongdoings and, at the same time, to introduce a means for taking remedial action when improper activity is disclosed. We believe that this authority gives the Special Counsel the responsibility to be the focal point in encouraging Federal employees to disclose wrongful activities.

Office of the Special Counsel

1717 H Street, N.W.
Washington, D.C. 20419

SEP 9 1980

Mr. H. L. Krieger
Director
Federal Personnel and Compensation Division
U.S. General Accounting Office
Washington, D.C. 20448

Dear Mr. Krieger:

This is in further response to your letter of August 8, 1980, requesting our comments on the draft report entitled "Federal Whistleblowing--Much More Needs To Be Done." We appreciate the opportunity to comment on the draft report. Our general comments are set forth below. We are furnishing your staff with a marked copy of the report setting forth more detailed comments.

(1) Role of the Special Counsel in protecting whistleblowers. The draft report refers to the role of the Special Counsel in encouraging Federal employees to report waste, mismanagement and other wrongdoing in Government. The role of agency Inspectors General and the General Accounting Office in this regard should also be spelled out in the report. Otherwise the report misleads the reader to believe that encouraging whistleblowing is the sole and exclusive responsibility of the Special Counsel. (See pages 1 and 2 of the draft report). [page 5]

(2) Adequacy of Special Counsel investigations. The draft report implies that GAO found some Special Counsel investigations to be inaccurate and incomplete (see pages 2, 10; App. I, pp. 19-22). The report does not make clear the distinction between agency investigation of a whistleblower allegation and an investigation by the Special Counsel's Office of a charge of reprisal for whistleblowing. There is no indication in the draft report that GAO made any independent analysis of the adequacy of the investigations. Instead, the report focuses on criticism of Special Counsel investigations by complainants themselves, particularly in situations where the investigations did not substantiate the complainants' allegations. Even where this Office is successful in securing relief from reprisal, either through negotiations with the agency or action before the Merit Systems Protection Board, the affected employee rarely expresses or feels appreciation or gratitude. The pain of having been unfairly removed, reprimanded, or reassigned normally continues, even where the action has been corrected as a result of filing a complaint with the Special Counsel. Criticism or lack of praise from employees who believe they have been wronged is not an accurate criteria for measuring the success of the Special Counsel's Office and the report fails to adequately explain this.

Nor is the criticism by agency officials, who rarely welcome questioning by Special Counsel investigators, a fair measure. Especially where the Special Counsel finds agency wrongdoing, it is common practice to "attack the investigator."

The report also notes (App. I, p. 22) that the Merit Systems Protection Board has voiced concerns about the quality of Special Counsel investigations. However, most Special Counsel investigations are never reviewed by the Board. Only in cases where the Special Counsel files petitions for stays of personnel actions or complaints does the Board have an opportunity to review Special Counsel investigations. The Board remarks cited in the report were made in an effort to defend action by the Board criticized at the March House subcommittee hearing, in conducting Board hearings and inviting participation of not only the agency, but the Office of Personnel Management, on Special Counsel stay requests filed pursuant to 5 U.S.C 1208(b). No such hearings or agency or OPM participation are contemplated by the statute. (The Board has not conducted such hearings in 1208(b) stay requests since the March oversight hearings noted on page 22 of the report). [This section was deleted from the report.]

(3) Communications with whistleblowers and delays in case processing. The draft report states that the Office of the Special Counsel has not adequately communicated with whistleblowers and that there have been delays in case processing. It should be pointed out in the report that in some instances, Special Counsel staff hold cases open rather than placing them in the closed case files for a period of time awaiting further information from the complainant, or because action by the agency is anticipated which may be sufficient to give the Office jurisdiction to take action to assist the employee (e.g., where no personnel action has yet occurred but may be expected because of problems the employee is facing in the agency). The report incorrectly implies that a delay is always contrary to the interests of the employee.

Unfortunately, the few cases reviewed by GAO were those closed during the first three months of this year, when this Office was still operating with less than one-third of its authorized staff and had not yet had an opportunity to complete its staffing. We believe that it is important that the report make clear that the information is dated and obsolete. Otherwise, the report itself could unfairly damage the credibility of the Office with the Federal workforce.

The report notes that one of the causes for processing delays is the lack of a case control and monitoring system and stresses the need for a computer complaint tracking system. Extensive delays have occurred in establishing our computer case tracking system due to delays on the part of the General Services Administration and the building contractor in providing a computer room. The computer is now in place and is now operational in the Central office. However, due to the budget rescission, the system will not be operational in our field offices until next fiscal year. [pages 2, 3, and 4]

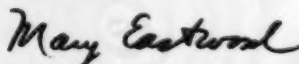
(4) Outreach--information pamphlet. The draft report notes that the Special Counsel was issuing an informational pamphlet on the role of the Special Counsel, but suggests that the pamphlet may be too "legalized" and confusing for many Federal employees to understand (App. I, pp. 4-5). The information pamphlet was written by a non-attorney so that it would not be too legalistic and would be readable. A copy of the pamphlet is enclosed. Almost half of the initial 50,000 copies have already been distributed to Federal employees, agencies, unions, either employee organizations, and public interest groups. The pamphlet has been very well received, and has not been otherwise criticized as being too "legalistic" or technical. A more simplistic pamphlet would have little utility and might serve to mislead employees regarding the functions of this Office.

With regard to distribution, we plan to order additional copies when the current supply runs out (early next fiscal year). At that time, agencies will be given an opportunity to purchase supplies of the pamphlet for their employees directly from the Government Printing Office. It is our view that printing and distribution costs of the pamphlet properly should be shared with the agencies, and that the entire burden should not be placed on the Special Counsel's relatively miniscule appropriation. [page 5]

As you know, this Office is presently operating with a skeleton staff as a result of detailing almost two-thirds of the staff to the Merit Systems Protection Board to avoid a deficit due to the rescission by the Congress of 45% of the Special Counsel's appropriation for FY 1980. For this reason, we have been unable to review in detail and to comment on all aspects of the draft report.

Finally, on August 15, I was questioned about recommendations in the draft report by a member of the press (Wall Street Journal). Because of the restrictions on the use of the draft report, I declined to answer any questions or to make any comment. We are very concerned, however, that your distribution of the draft report to persons outside this Office has resulted in premature release of at least some of the recommendations to a member of the media before this Office had an opportunity to review and submit comments on the report.

Sincerely,



Mary Eastwood
Acting Special Counsel

GAO note: Page numbers in brackets are page references to this report.

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